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IN THE

Supreme Court of the United States

OCTOBER TERM, 1934

No. 522

MANUFACTURERS' FINANCE COMPANY,
Petitioner,

vs.

FRANK M. McKEY, as Trustee in Bankruptcy of the Estate of GRIGSBY-GRUNOW COMPANY,
Respondent.

REPLY BRIEF OF PETITIONER.

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REPLY BRIEF OF PETITIONER.

In making this reply, we will endeavor to answer all of the arguments advanced by respondent in the same order as made in respondent's brief.

At page 1 respondent contends that the receivers were at all times willing to pay petitioner its advances and compensation, pursuant to the contract up to the date of their appointment, and 7 per cent interest thereafter. This is incorrect. The bone of contention prior to the filing of the intervening petition arose out of the act of the receivers the day following their appointment, in procuring an *ex parte* order whereby the receivers obtained author-

ity to deliver to petitioner funds coming into their possession from assigned accounts receivable *on the same basis as prior to the filing of the original bill of complaint* (R. 63). When petitioner was advised of said order it strenuously objected to the italicized portion and contended that while the order may on its face look harmless, actually it might result in a substantial loss to petitioner, and that it would be unwise for petitioner to turn back any part of the collections until it was reasonably assured of full payment of the amount due to it out of the accounts it then held (R. 63). Conferences thereupon ensued between the receivers and counsel for petitioner (R. 64). The receivers demanded that petitioner pay over one-half of the collections on assigned accounts or permit the receivers to retain one-half thereof, which was not agreeable (R. 63). The reasons petitioner then gave for such refusal were that under the terms of the contract it was not required to return any part of the remainder (R. 63, 64); that there were numerous breaches of warranties materially affecting the value of the accounts; and mainly, that it feared sustaining a substantial loss in the event that some of the accounts were not paid in full (R. 64).

The record discloses that thereupon the receivers offered to recognize a *general* claim by petitioner for the amount of such loss, which claim would have been in the same class as that of other unsecured creditors (R. 64). When the receivers were appointed petitioner held $550,000 in accounts, out of which to collect approximately $265,000 (R. 13). The money was owing by dealers and distributors of the Grigsby-Grunow Company and the ultimate collectibility of the accounts was then in considerable doubt (R. 24), notwithstanding that the trial court found that there never was any doubt but that to the amount of collections petitioner would have been paid (R. 72) and notwithstanding that the Court of Appeals accepted as proven the alleged fact that there was never any question

but that petitioner would be paid in full, plus interest after receivership at the rate of 7 per cent per annum (R. 95).

The record is not clear, but in respondent's brief, at page 7, he says:

> "The assigned accounts were owed largely by so-called distributors (R. 25), who purchased radios, tubes, and refrigerators and in turn sold to wholesalers and retailers. The receivership tended 'to freeze' these accounts and for a week or ten days collections were small (R. 24). To induce the distributors to pay, to enable them to pay, and to avoid litigation over set-offs, it was necessary to assist the distributors in 'moving' their merchandise, and it was necessary to reduce prices on certain items (R. 24) and to take back some merchandise (R. 24). To assist in 'moving' their merchandise the receivers expended $35,000 in local advertising (R. 24, 25, 71, 74). The receivers also held distributors' meetings in New York and Chicago (R. 24, 25), and performed other special services particularly in connection with one of the assigned accounts which was $100,000 in amount. (R. 64.)"

The expenditure by the receivers of $35,000 in local advertising to assist in moving merchandise sold to dealers and distributors and the other acts of the receivers done they say, to stimulate collections, is sufficient evidence that there was considerable doubt as to whether these accounts would be paid in full. The very purpose of taking accounts in twice the amount of cash advanced was to protect the petitioner in the event it was unable to collect the accounts in full.

The record is silent as to the reason why the receivers retained these collections and we submit that the excuse now tendered by respondent at page 3 of his brief that "some part of the period of 35 days was attributable to appraisal of the validity of the assignments, to audits, to notice to parties to the record and in obtaining

orders of court" appears for the first time and is not to be found anywhere in the record. The latter portion of the sentence "the money collected meanwhile reposing securely in a special bank account" being the only portion of that sentence referred to in the reference to the record (R. 74).

Indicative of their anxiety to pay petitioner, respondent stated (Resp. Br. 3) that "each order for payment to petitioner was upon the receivers' own motion" and refers to Record 67 and 68. What actually occurred, however, is more clearly shown by the amended stipulation of facts at the top of page 65 of the record. It is there stated that on the receivers' motion to pay the finance company they were authorized to pay $140,000 on account, over the objections of attorneys for the petitioner who requested that the order at that time be for $223,973.55 and represented moneys collected on accounts theretofore assigned to petitioner. On December 12, 1933, there was a similar occurrence. The receivers then had $56,732.16 and over the objections of petitioner the court required them to pay merely $36,159.30. The stipulated facts also show that the receivers refused to pay petitioner until directed to do so by the court (R. 19). This attitude of the receivers is further emphasized by the detailed order entered, which recites that the payment of the $140,000 and the $36,159.30 above mentioned by the receivers to be without prejudice to either intervening petitioner or the receivers as to any point or issue in the intervening petition or the answers thereto, or on any point which may be added by amendment by either party (R. 67). If there was no controversy between the parties, why these reservations?

Instead of a willingness to pay petitioner in full, it would seem that the serious dispute between the receivers and petitioner resulted from the effort by the receivers to deduct 50 per cent from collections on assigned accounts and to force petitioner into this bargain, the receivers retained all of the collections (R. 19). We insist that the acts of

the receivers as shown by the record are to the contrary of their present contention and instead of a willingness to pay, it is evident that the day following their appointment the order was entered on their own petition, the result of which was to adjudicate petitioner's rights without a day in court and without any opportunity to be heard.

The next point made is that petitioner (Resp. Br. 2) asserted a claim for $7,800 attorney's fees and they refer to Record 29. This, we submit, is thoroughly misleading and incorrect. At no time did the petitioner ever ask for $7,800. Throughout these proceedings it requested reasonable attorney's fees and one witness called as an expert testified that in his opinion, based on an hypothetical question submitted to him, $7,800 would be a reasonable fee. By this unfair attitude the receivers apparently persuaded the trial court into believing that petitioner was making claim "for a large sum of money, something in excess of $7,000 for attorney's fees in and about enforcing its claim" (R. 70), and in the findings of fact further persuaded the District Court to make a grossly erroneous finding that "no evidence was introduced as to the amount of reasonable attorney's fees, if any, for counsel for intervening petitioner for services necessarily rendered herein." (R. 75.) The Court of Appeals followed the finding of the lower court and the argument of respondent, and found as a fact that petitioner was asking for $7,800 attorney's fees (R. 95).

The facts relating to the necessity for petitioner retaining counsel and the amount in dispute are fully covered in our main brief, pages 26 to 29.

The next point made (Resp. Br. 2) is that the contract in evidence has been held by courts to be a contract for the loan of money with a pledge of the accounts as security and not what it purports to be, a contract for services and for the sale of accounts.

In the note a number of authorities are cited which we shall take up separately and point out why these cases do not apply.

In *Home Bond Co.* v. *McChesney,* 239 U. S. 568, the contract is different from the contract in the instant case in that it does not provide for the rendition of any services by the finance company. The trustees' answer claimed that the contract was a mere sham to cover up an usurious transaction. The bankrupt was a Kentucky corporation and the finance company an Indiana corporation, and under the laws of both states usury was prohibited. There was a stipulation of facts, under which the special master found that the contracts were not sales of the accounts, but security for loans. Here, there is not one vestige of proof or claim by the receivers that all of the services rendered by petitioner required by it to be rendered under the contract were not actually and in fact rendered. The value of the services are not in dispute and under the Illinois law as pointed out in our main brief, since 1919 corporations are prohibited from defending on the ground of usury. (Cahill's Ill. Rev. Stat. 1933 Ed. Chap. 32, Sec. 5 (h), p. 725.)

In *Mercantile Trust Co.* v. *Kastor,* 273 Ill. 332, the contract is almost identical with the contract in the *Home Bond* case. No provision whatever is made for the rendition of any services by the finance company. That decision was made in 1916, three years before the Legislature of Illinois adopted statutes permitting corporations to pay any rate of interest, without regard to or restriction under the usury laws of the state (Cahill's Ill. Rev. Stat., 1933

Ed., Ch. 32, Sec. 5 (h), p. 725), and the defense claimed that the contract was an usurious agreement for the loan of money, which was *ultra vires* the finance company and forbidden by the laws of Illinois, and the court found that there was no dispute in the evidence relating to this question (p. 337).

Dorothy v. *Commonwealth Co.,* 278 Ill. 629, was decided subsequent to the *Kastor* case and the court in their first sentence of the opinion states that the facts are similar to the *Kastor* case. The contract which is set out in the opinion does not provide for the performance of any services by the finance company and the rendition of services is not claimed.

General Motors Acceptance Corporation v. *Mid-West Chevrolet Co.,* 66 Fed. (2d) 1, arose in Oklahoma where by law a corporation may recover usury paid. That case does not involve a contract similar to this, but involves the purchase of conditional sales contracts and chattel mortgages resulting from the retail sale of automobiles. It was there held that the plan was not usurious. The court, however, says (p. 4):

> "Whether a transaction is tainted with usury is a question of fact but like all other questions of fact it is a question of law whether the proof discloses substantial evidence thereof."

Here, there is no claim of usury by the receivers.

Tennessee Finance Co. v. *Thompson,* 278 Fed. 597, involves a claim for wages assigned to a finance company and does not involve the construction of any contract similar to the one in the instant case.

Commercial Security Co. v. *Holcombe,* 262 Fed. 657. The contract is not described in the opinion, but we think it is safe to assume that it does not involve any question of services rendered by the finance company, and furthermore,

under the laws of the state where the bankrupt was organized, corporations could defend on the ground of usury.

National Discount Co. v. *Evans,* 272 Fed. 570. The bankrupt was an Ohio corporation and the finance company did business in Ohio. The court found that the contract was made and was to be performed in Ohio, where at that time interest in excess of 6 per cent was considered as usurious and corporations could defend on that ground. There is nothing in the opinion to show that the terms of the contract provided for the performance of any services by the finance company.

In *LeSueur* v. *Manufacturers' Finance Co.,* 285 Fed. 490, the contract does not provide for the rendition of any services by the finance company. An additional defense urged was that the finance company was doing business in Tennessee without authority. The court held that the finance company could recover the principal of its advances, together with interest at 6 per cent for the reason that under the statutes of Maryland, loan contracts were invalid only to the extent of interest in excess of 6 per cent per annum (p. 498 opinion).

In *National Trust & Credit Co.* v. *F. H. Orcutt & Son Co.,* 259 Fed. 830, two defenses were urged. One that the contract was for the loan of money and not a sale of the accounts, and hence usurious under the Illinois law, as it then existed, and secondly, that the contract was *ultra vires* the finance company, following the theory and reasoning of the *Kastor* and *Dorothy* cases. The matter arose in the 7th Circuit and was an appeal from the Northern District of Illinois. The opinion does not set forth the contract, but there is an abundance of evidence and testimony in the record as to the intention of the parties that this was to be a loan and not a sale.

The foregoing cases, in our judgment, do not apply for the reason that they all arose under contracts with cor-

porations who had no power to loan money under their corporate charters or the borrower by state law had the right to urge usury as a defense. Not one single contract corresponds to the theory of the contract in the instant case. The disguise of the form of the transaction is apparent in each of the cases cited. Here, no necessity exists for any disguise because by statute Illinois corporations are permitted to pay any rate of interest they see fit and *ultra vires* is no longer a defense. (Cahill's Ill. Rev. Stat. 1933, Ch. 32, Sec. 8, p. 725.)

If this contract provided for a straight loan and the interest was calculated in the same manner that the compensation is figured in this contract, and the note contained no provision whatever for the rendition of services by petitioner, the note would be collectible, even though it provided for the payment of interest at a rate of 28.3 per cent.

The court will observe that none of the foregoing decisions arose in equity. They are all matters in bankruptcy where the borrower or the seller of the accounts was *insolvent.*

Not one single case refers to any services to be rendered by the finance company. In this contract there is a vast amount of services to be rendered by the finance company, who alleges full performance. The receivers by their answer do not deny that such services were rendered, and therefore that fact would seem to be admitted.

It would seem to us that the facts in the instant case, as stipulated by the parties and the small amount of testimony that was offered, falls clearly within the decision of this court in *Houghton* v. *Burden,* 228 U. S. 161. There, Canfield, the bankrupt, borrowed $10,000 from Burden and as security assigned $14,000 in book accounts. Under the terms of the contract Burden was to render a small amount of service to Canfield. The loan was to be paid with 6 per

cent interest, and in addition thereto, compensation of 1 per cent per month upon the amount of the accounts remaining uncollected at the end of each month was agreed upon. This court says, page 170:

> "The instrument upon its face is not usurious. Of course, if the service to be rendered should be made to appear trivial and of no real importance, the inference might be drawn that the agreement in that particular was a sham and device to cover a mere usurious contract, such as we are asked to believe Burden declared it to be. Burden's plan was that the loan should carry with it light work, such as a retired business man might do,—one or two hours of office work each day, as he explained. * * *
>
> "To hold the agreement void would seem to require that we shall accept as true that there was no such service expected or required, and that the clause was inserted to cover a usurious bonus."

In the contract under consideration petitioner agreed to furnish credit information about its customers to the Grigsby-Grunow Company; have its auditors give the company the report of each examination provided for in the contract, with full information and advice as to the most desirable method of keeping the company's books, records and accounts; pay for all accounting, postage and credit investigations of accounts purchased or offered for purchase under the contract, and upon request to give financial and business advice; obtain and have on hand at all times sufficient funds to purchase acceptable accounts within the limits agreed upon under the contract; supply all forms needed for the assignment of accounts; place petitioner's credit and collection department at the disposal of the company and permit submission of its sales contracts to the general counsel of petitioner for advice and opinion as to the form and legality thereof. The value of these services is not in dispute. The method of calcu-

lating the compensation is very similar to that used in the *Burden* case. Burden was to receive 1 per cent per month upon the amount of the uncollected accounts at the end of each month. In this instance petitioner was to receive for services and the advance of money, and in lieu of all interest, 83½ per cent of 1/30 of 1 per cent of the net face amount of accounts for each day from the date of purchase by, until paid to, petitioner.

It is elementary that courts have the right and the duty to look through a contract in order to discover the intention of the parties and if it finds that the parties intended to violate the usury, or any other, statutes, that fact may be established; but this cannot be done without pleadings or evidence. Even if it be conceded that the petitioner did make a contract with the company for a loan of money it is respectfully insisted that this is valid under the law and is no part of the issues here, for the reason that it was not raised in the pleadings and no proof whatever was presented to the District Court on that subject.

At page 3 respondent argues that petitioner never asserted charges against the Grigsby-Grunow Company in excess of 20 per cent. The answer is obvious. Before the receivers were appointed, the company fully performed its agreement, remitted collections to petitioner each day as received, an adjustment was made and the remainder of the purchase price paid by petitioner to the company. If the company had deposited all of the collections in its bank account and refused to remit the same to petitioner the rate of compensation would have increased.

Moreover the receivers did not pay any specific accounts collected. Pursuant to orders of court they paid lump sums, hence petitioner was estopped from applying such payments to specific accounts so as to reduce the aggre-

gate balances of accounts outstanding. The District Court found that petitioner "no longer made such adjustments so as to maintain the outstanding balances of cash advances at one-half the aggregate amount of accounts receivable and trade acceptances assigned, and applied literally the provisions of the contract which permitted the charging of interest at the rate of 10 per cent per annum upon the aggregate amount of accounts receivable and trade acceptances remaining assigned, notwithstanding the reduction from time to time in outstanding balances of cash advances." (R. 73.) Under the circumstances petitioner could not do otherwise. The computation of compensation at the contract rate was shown as $4,394.48 (R. 45); interest at 7 per cent as $1,087.93 (R. 45) and at the rate of 20 per cent as $3,096.22 (R. 63). It appears that the District Court could, with much greater consistency, have adopted the latter rate, which it did as to compensation accruing prior to the date of receivership, but paid after that date by the receivers.

The Fund Created by the Receivers.

The main point urged under this heading, by the respondent, is that the petitioner at no time gave or sought to give notice of the assignments to the debtors of the accounts. In this connection it will be observed that in the order appointing the receivers (R. 9) all persons were "enjoined from interfering with said receivers in the possession of said property of said defendant, and in the administration of their trust and in the performance of the duties imposed upon them as receivers herein," and in the petition of the receivers filed Novevmber 25, 1933 (R. 10, 11) the receivers stated that "under the terms of said contracts * * * the finance companies have the right to notify debtors under said accounts receivable, which debtors are distributors and dealers, and said finance companies have

the further right to send their representatives to the office of the defendant corporation, at the expense of the defendant corporation, to check moneys received by the defendant corporation on said accounts receivable * * * If said finance companies did notify the debtors under said accounts receivable, so assigned, great loss would inure to the good will of the defendant corporation, or if said finance companies sent representatives to the office of the defendant corporation to check up said accounts receivable, a large expense would be entailed by the defendant corporation," (R. 11) and in the answer to the intervening petition the receivers allege that the contract involves merely a loan of money to the amount of the advances, and "that no notice having been given to debtors of accounts, the barring order heretofore in this proceeding entered, restrains the intervening petitioner from giving any notice upon such contract." (R. 18.) The respondent further argues that because the finance company did not give notice to debtors it became the duty of the receivers to make these collections of all of the accounts then assigned and in making such collections they spent $35,000 in "further advertising" and that few, if any, of these acts done to stimulate collections could have possibly been performed by the finance company.

The fallacy of this argument lies in the fact that under the terms of the contract it was the obligation of the company to deliver to petitioner on the day of receipt thereof, all original checks, drafts, notes and other evidences of payment received in payment of the accounts purchased by petitioner (R. 47). No duty devolved upon the receivers to make these collections. They were mere volunteers. In the final analysis, however, it probably was more economical for them to make the collections by reason of the company's acquaintanceship with the dealers and distributors, who were the principal debtors, than it would have

been for the finance company, but in this respect the contract provides that if the finance company does make the collections, it shall be reimbursed the expense thereof. Let us see what would have happened if petitioner would have given notice after these orders had been entered by the District Court, first, it undoubtedly would have been in contempt (R. 9); second, the good will of the company would have been injured (R. 11); third, and the expense incurred in giving such notice would have been chargeable to the funds collected (R. 11). Considered from any point of view, respondent's argument that because notice was not given the receivers went to the expense of $35,000, is without merit.

Our argument in full with respect to the $35,000 expenditure and the apparent reasons therefor appear at pages 26 and 27 of our main brief.

Delays in Payment Inherent in Receivership Administration.

The argument under this point, it seems to us, is wholly inconsistent with the argument by the receivers that they were at all times willing to pay the petitioner in full, plus interest at 7 per cent. The gentlemen who were appointed were not professional receivers. May we call the court's attention to the record which shows that one of the receivers, Leroi J. Williams was the vice president of the Grigsby-Grunow Company and signed the contract (R. 52) and the other receiver, Thomas L. Marshall, who now appears as attorney for the respondent, was, during the time of the receivership, the attorney for, and director of Manufacturers & Dealers Finance Corporation to whom the Grisby-Grunow Company had also sold certain of its accounts receivable, presumably under a similar contract (R. 29). To conclusively show that both receivers knew and understood the contract in every respect, we find that

the day following their appointment they appeared in the District Court, and in their petition set forth all of the terms of the contract and the rights of the receivers and the liability thereunder and procured an order to be entered under which they would have operated the business on funds belonging to this petitioner (R. 12) if petitioner had not intervened (R. 13). The record discloses that the intervening petition was filed November 29th and on December 6th the answer of the receivers was filed. The matter was then at issue. The suggestion now made that the receivers did not have an accounting of collections upon the trade acceptances is not borne out by the record. It is difficult to conceive that receivers, as aggressive as these receivers apparently were, would not know at all times exactly where moneys were, which belonged to the estate. A telephonic request would have procured the information they now claim contributed to a delay of thirty-five days in settling with petitioner. We submit that this last thought of the receivers is without much force.

Attorney's Fees.

This point has been covered fully heretofore, and it is submitted that the findings of fact as shown by respondent's brief and the court's opinion are wholly inconsistent.

In the findings, the court holds that NO evidence whatever was introduced as to the amount of reasonable attorney's fees, and in the opinion the court says that it cannot see any reason for intervening petitioner having obligated itself for attorney's fees in any considerable amount. The stipulated facts in this case and the record conclusively show that there was evidence of the expenditure of a vast amount of time by counsel for petitioner and in a matter involving over $250,000 ample justification for engagement of counsel appears, and reasonable attorney's fees should have been allowed.

This has been covered in our main brief, pages 26 to 29.

The Purported Conflict Between Circuits.

Under this heading the respondent endeavors to show that there is no conflict between the 2nd and the 7th Circuits. We believe that this argument relates to the question of jurisdiction heretofore considered by this court in granting certiorari and therefore requiring no reply.

Under this point it is also argued that the case of *Merchants & Manufacturers Securities Co.* v. *Johnson*, 69 Fed. (2nd) 940 (8th Circuit) and *In re*: *International Raw Material Corporation*, 22 Fed. (2nd) 920 (2nd Circuit) are not in conflict with the instant decision.

In the *Johnson* case 6 per cent interest after receivership was the only prayer of the finance company. That case involved questions of doing business in Missouri without authority as a foreign corporation and involved the construction of the state constitution which provides for the forfeiture of the lien of a pledge if interest in excess of 8 per cent is exacted. Both questions, in so far as they related to a finance company doing business in Missouri had never been passed upon, and those being the more important questions in the case, the finance company did not question the allowance of interest after the appointment of the receiver and assigned no error thereon. The *Johnson* case was cited on the matter of allowance of attorneys' fees.

In the *International* case the court squarely passed upon the question as stated in the opinion:

> "Can an agreement by a corporation to pay a rate of interest or a commission in excess of the legal rate be held invalid by a court of bankruptcy, having the custody of a fund which is collateral security for the performance of the agreement, upon the ground that a lien upon that fund for an excessive rate is unconscionable and should not be sanctioned by a court of equity?" * * * "The contention that an agree-

ment by the bankrupt corporation to pay more than 6 per cent., be it called commissions or interest, was illegal, and should not be enforced against the collateral, is largely based upon the recent decision of the Circuit Court of Appeals of the 8th Circuit (should be 7th) in the case of *In re*: Chicago Reed & Furniture Co., *supra*. The court there held that, irrespective of the usury law of Illinois, a court of bankruptcy would not enforce an agreement which in that case involved payment from the proceeds of mortgaged property of an amount due for commissions and interest calculated at a rate of over 40 per cent. per annum. Here there seems to be no doubt that the parties agreed among themselves to pay 6 per cent. as interest on the loan and the additional sum of 1½ per cent. per month as a so-called commission. We know of nothing to prevent such an agreement. The New York statute provides that no corporation shall interpose the defense of usury, and this has been held in effect to repeal the usury laws so far as the contracts of corporations are concerned. Neither the corporations, nor those who may succeed to their rights, nor their sureties, are heard to object to their bargain, either at law or in equity, because of usury. *Curtis* v. *Leavitt,* 15 N. Y. 9; *Stewart* v. *Bramhall,* 74 N. Y. 85; *Gamble* v. *Queens County Water Co.,* 123 N. Y. 108, 25 N. E., 201, 9 L. R. A. 527; *Hubbard* v. *Tod,* 171 U. S. 474, 19 S. Ct. 14, 43 L. Ed. 246; The Vigilancia (C.C.A.) 73 F. 452."

The receivers then admit that the Second Circuit in *In re*: *Gotham Can Co.,* 48 Fed. (2d) 540, does allow interest at the contract rate after receivership. The *Gotham* case is only one of many allowing compensation under this form of contract subsequent to the appointment of a receiver. In the *Gotham* case the contract is not set forth but the subject matter as disclosed by the opinion is almost identical with the facts in the instant case, and one of the main items in dispute was compensation after adjudication. With respect to this phase of the case the court said (p. 541):

> "The finance company might be regarded as entitled to hold the accounts until they were all collected, even though its cash advances and expenses up to any particular date were satisfied. If so, the one-thirtieth of 1 per cent. daily charge could continue to roll up so long as any accounts remain unpaid. And this would be true whether the transactions were regarded as sales or loans."

In Matter of Lutz & Schramm Co. Inc., 38 A.B.R. 351 compensation subsequent to the appointment of the receivers was one of the principal issues. The receiver contended that he was not liable for compensation subsequent to his appointment and the court said (p. 355):

> "When the receiver took possession of the assets, it found that certain accounts had been duly sold and assigned on the books of the bankrupt to the Credit Company and were duly ear-marked as their property. With knowledge of this fact, the receiver subsequently received into its hands funds belonging to the credit company on account of the accounts so assigned. These funds belonged to the Credit Company. The moving consideration for the purchase of the accounts was the compensation to which the company was entitled. * * * And under the authority of the court the receiver continued the operation of the business of the bankrupt concern in order to preserve its good will. In connection therewith, it collected the accounts which had been sold to the Credit Company."
> * * *
>
> "The receiver represents the estate of Lutz & Schramm, and its rights are no broader than those of the bankrupt. * * * The amount of compensation depended upon the time of payment. Under all the circumstances of the case, I can see no legal reason why the claimant is not entitled to the compensation provided in the contract."

In *Estes* v. *E. B. Estes & Son,* 24 Fed. (2d) 756, the receiver filed a petition for instructions, stating that the

finance company had been paid in full under the contract, excepting that it was claiming compensation, attorney's fees and other charges, concerning the legality of which claim the receiver is in doubt. In that connection the court, at page 757, said:

> "The service rendered for which the Estes Company was willing to pay was the advancement of money upon its receivables enabling it to use the proceeds of the accounts without waiting their maturity or payment. This service was rendered and was quite likely all the parties actually contemplated. The court is not called upon to inquire into the reasonableness of this compensation. It is the contract which the Estes Company entered into and the receiver is bound thereby, even though it should be deemed to be of little or no advantage to the company. See *Ramsey* v *Marlin Firearms Corp., supra* (14 Fed. (2d) 341). The receiver therefore, is instructed not to resist the claim of the finance company for compensation accruing both before and after his appointment."

See also *Ramsey* v. *Marlin Firearms Corporation,* 14 Fed. (2d) 314.

Respondent says (p. 11) that petitioner repeatedly attacks the case of *In re: Chicago Reed & Furniture Co.,* 7 Fed. (2d) 885, and quotes from the opinion in that case where the court announces the rule that the Illinois statute permitting corporations to pay any rate of interest did not abrogate the rule that courts of equity will not lend their aid to enforce contracts which, upon their face, are so manifestly harsh and oppressive as to shock the conscience, and this has been fully and completely answered at pages 17 to 23 of our main brief. We contend that this principle of law is not applicable to a case where a Federal court sitting within Illinois appoints receivers in equity of a *solvent* corporation, and where the rate of compensation or interest is permitted by state laws, and particularly where an intervenor is not seeking equity, but merely asserting its legal rights in an equity suit.

The Position of the Finance Company Is That It Can Place Upon the Receivers the Large Expense of Conservation and Collection of the Accounts and, Without Contribution Thereto, Can in Equity Even Charge the Receivers 28-3/10 Per Cent Interest for the Period During Which the Receivers Were Creating the Fund to Pay the Finance Company.

Again the receivers discuss the fact that the finance company did not give notice to debtors of the assignments, and conclude that petitioner was powerless to accomplish, with the distributors, what the operating receivers were able to accomplish. The receivers are seeking to fasten a liability on the finance company to pay a portion of the $35,000 expended by the receivers for "further advertising."

The contention of the receivers that petitioner should be charged with the cost of collecting the assigned accounts, notwithstanding the contract to the contrary, and the finding of the District Court that no offer was made by petitioner to contribute to such expense, is without force.

On December 1, 1933, two days after the intervening petition was filed the receivers filed a petition (R. 58), in which they set forth that:

> "Some forty distributors assembled in Chicago November 28, 1933 and in a meeting urged upon the receivers that a conservative advertising appropriation be made for immediate newspaper advertising in the 52 centers of the United States involved. The reasons for this request were preservation of the good will of the business, furthering of the moving of merchandise from dealers' and distributors' stores and warehouses, and fundamentally the building up of a foundation for the new lines in January and, above all, the immediate showing to the public that the Majestic radios and refrigerators are not out of business and can still be bought with assurance that the business is being maintained and will be maintained."

And on the same day the trial court entered an order authorizing said receivers:

> "In the operation of the business, to expend from the assets of the receivership estate for further advertising during the month of December 1933 the sum of $35,000.00." (R. 61)

How was petitioner to know that the receivers intended to ask that it pay a portion of the collection expense when not one word is mentioned in the receivers' petition. The receivers, by their answers to the intervening petition, contend that such advertising expense was incurred for the purpose of realizing on assigned accounts receivable. The testimony in this respect came from Mr. Whitfield, chief accountant for the receivers and substantially is that at the time of the receivership the collections were practically at a standstill and so remained for a week or ten days. Over objections by petitioner to the line of examination the witness was permitted to state:

> "There was a price concession on one particular line of a substantial amount. In fact, in my opinion there was practically everything being done, a combination of items, to thaw out the accounts. There were price concessions. We took back merchandise and we put through special allowances. It was necessary to get some money and so we strove to get them." (R. 24.)

This same witness, on cross-examination, testified that the distributors were more or less at sea and did not know whether business was going to continue and hence expected some difficulty in collecting the accounts. When pressed to explain what the advertising consisted of the witness stated:

> "The advertising generally consisted of special appropriations to the distributors of money to be spent by them. It was not paid in cash. It was just in the form of credit memos to their accounts." (R. 25.)

"Q. Well, just what was the advertising? * * * *
A. It was allotted to the distributor.
Q. To do advertising?
A. In the local territory.
Q. Just an inducement to the distributor to continue in the fold of Grigsby-Grunow?
A. To continue with Grigsby-Grunow." (R. 25.)

Nowhere in the record or the stipulation of facts does it appear that one cent of the $35,000 was expended in connection with any account assigned to petitioner. The court's finding in this respect was not based on anything in the record. What amount the receivers were asking that petitioner be required to pay or contribute is not expressed in the answer or in the findings by the court. Without any testimony or evidence of any kind, the trial court could not have arrived at any amount that petitioner was to pay or be charged with. How the expenditure by the receivers of $35,000 for "advertising" helped to collect the assigned accounts, no one can accurately determine. Whether the petitioner profited by the expenditure is highly conjectural. The record discloses that at the time the receivers were appointed the petitioner had over $550,000 in assigned accounts and trade acceptances, and the balance of money then due it was less than $275,000. Before the advertising appropriation was expended the Ford Motor Company paid the receivers $100,000, which account was then owned by petitioner (R. 64). There was then on deposit in the special bank account of the receivers over $50,000 resulting from collections on the accounts held by petitioner (R. 64). Petitioner had indefensible trade acceptances in the sum of $85,647.22 (R. 44). The last three amounts total $235,647.22. Following the receivers' contention to a logical conclusion, one finds that before any part of the advertising appropriation was spent, less than $40,000 would have paid off all claims of petitioner, and petitioner had accounts in the sum of $314,352.75 out of

which it could collect such balance. To collect $40,000 the receivers contend they spent $35,000 for advertising, which "redounded to the benefit of petitioner" and hence petitioner should pay for such advertising.

Before the receivers were appointed the accounts apparently were paying in due course, but perhaps because of the appointment of receivers the distributors were worried whether Grigsby-Grunow Company would continue in business, and the receivers, in order to assure the distributors of the continuance of business and to preserve their good will and patronage made "price concessions on one particular line of a substantial amount * * * Took back merchandise and put through special allowances." Were the receivers worried that petitioner would not be paid in full its balance of $40,000 out of $314,000 in accounts, or were they endeavoring to collect the remainder after petitioner was paid in full? If the receivers expected contribution for such advertising why was not that matter discussed with its counsel? Why was not something set forth in the petition that the advertising expenditure was "to thaw out accounts" that had been assigned to petitioner, and why was there no request of the court that an order be entered that a portion of such advertising expense should be borne by petitioner, thereby giving it an opportunity to be heard and presenting its point of view? When we consider the entire petition for advertising wherein the receivers advise the court that the company intended to expend $100,000 for advertising during the month of December, 1933, and that prior to the receivership the entire advertising program was cancelled with the exception of the double page in the Saturday Evening Post, which was released several weeks prior to the receivership (R. 57); that there still remains in the hands of distributors 43,629 radios and in the hands of dealers 21,000 radios and in the hands of the factory 13,000 radios, and 22,000 other radios partially completed, all of which such merchandise

should be cleared prior to January, when new models will be produced (R. 58); that the receivers believed that a reasonable amount of advertising is essential in order to move such goods and that successful operation of the receivership as a going concern could not countenance dumping of the merchandise either by the dealers, distributors or by the factory, and such a result has not so far happened; that of the foregoing radios substantially the entire amount of 64,000 sets in the hands of distributors and dealers are represented by accounts receivable and that the ability to dispose of these radios by such dealers and distributors determines the soundness of the account, and that the accounts aggregate approximately $1,500,000. There are other matters recited in that petition, which concludes with this prayer:

> "Your petitioners are clear that both preservation of the good-will of the business and its operation as well as the preservation of the FREE accounts receivable and the equity in pledged accounts require their action." (R. 60.)

all of which shows that when the matter was presented to the District Court no thought existed in the minds of the receivers that any part of the expense of advertising was to be charged to the petitioner, but that the expenditure was made, as the petition recites, to retain and preserve the good will of the distributors and dealers. *In the Matter of Lutz & Schramm Co., Inc.,* 38 A.B.R. 351, where the receiver made a similar contention the court stated:

> "The collection of the accounts by them was for the benefit of the bankrupt estate, so as not to interfere with the preservation of the good will."

This is not a case of an insolvent company, but the case of one that is abundantly solvent (R. 3), and no proof whatever exists of the actual cost to the receivers of making the collections of the assigned accounts. Irrespective of that, whatever the expense, it was the liability of the

company and not the petitioner. Nothing is being taken from general creditors, but whatever the collection expense amounts to comes out of stockholders of the Grigsby-Grunow Company, the very same stockholders whose directors and agents signed the instant contract, were aware of its terms and fully expected to abide thereby.

LeSueur v. *Manufacturers Finance Co.*, 285 Fed. 490 relied upon by respondent presents an entirely different situation. There a contract was entered into between petitioner and the manufacturing company for the purchase of accounts receivable. The manufacturing company became financially involved and by act of its stockholders a committee was appointed to take charge of and liquidate its business, and subsequently a *new* agreement was entered into between the committee, the manufacturing company and petitioner, by which the manufacturing company agreed to forward by mail to petitioner, all original remittances and collections on accounts theretofore purchased, the contract containing the proviso:

> "With authority to the latter (finance company) to apply the same in accordance with the terms of the original contract of July 26, 1912, but without prejudice to the rights of the Manufacturing Company and its committee with 'respect to the matter of usury, or any other matters under' that contract, and the transactions had thereunder.* * *"

For a short period thereafter, the committee remitted collections and thereafter refused so to do, contending that the contract was usurious and void, and that the finance company was doing business in Tennessee without authority. Petitioner filed its bill of complaint asking for a decree against the liquidating committee, requiring such committee to deliver up all the accounts not collected and in default, or for the amount thereof, as well as for other relief. The defense was that the contract was usurious and the proceedings thereunder void, and that petitioner

was doing business in Tennessee without authority. The District Court first held that the contract was usurious under the laws of Maryland and void, and entered a decree accordingly. The court's attention was then called to a decision by the Court of Appeals of Maryland and the court then held after a reargument of the case, that the loans were not void, but the only effect of usury was to void the excessive interest over the legal rate. The first decree was set aside and the matter referred to a master, who found that the company was entitled to recover their advances plus 6 per cent interest and rejected the defendant's contention that the petitioner should be charged with expenses incurred in collecting the assigned accounts. A final decree was entered in accordance with the report of the master, and affirmed by the Court of Appeals, and with respect to the cost of the collections to the liquidating committee, the court says (p. 500):

> "In our opinion, however, the liquidating committee should have been allowed the cost of the collections which it made, the amount of which, as shown by uncontested evidence, is $4,446.52. True, by the agreement of 1912, between the Finance Company and the Manufacturing Company, the latter was to make collections at its sole expense, and in the agreement of July 30, 1914, between the liquidating committee and the Finance Company, the former agreed to forward remittances for accounts collected, 'in accordance with the terms of said contract of July 26, 1912,' there being, however, otherwise no reference, direct or indirect, to the cost of collection. The Manufacturing Company, however, is *insolvent;* its general creditors cannot be paid in full; the decree in plaintiff's favor exhausts the entire fund in the committee's hands arising from the collection of the assigned accounts; and unless expense of the collections by the committee upon these accounts is paid out of the amounts collected, the result is that such expense must be paid by general creditors. Assuming that the committee had power to agree to pay the expenses out of general

> assets, provided there remained sufficient to pay general creditors in full, not only is it open to serious doubt whether the committee had power to make such agreement as against general creditors of an insolvent estate (especially in view of the terms of the stockholders' assignment to the committee), but in our opinion to impose such liability would be inequitable as against general creditors."

Obviously, the situation in the *LeSueur* case was different than in the instant case. Here, receivers were appointed to operate the business of a solvent corporation having assets of $13,000,000 over and above all liabilities (R. 3). The receivers made credit allowances in the sum of $35,000 to their distributors to retain their good will and to continue their business relationship. In the *LeSueur* case the company was *insolvent* and there was proof of the actual cost (to general creditors) of making the collections. Here, so far as the record discloses there were assets more than sufficient to discharge the claims of all creditors in full and the only ones affected would be the stockholders of the company.

At pages 14 and 15 of his brief, respondent says:

> "The opposing brief refers to an allegation in a pleading in the underlying proceeding in which the receivers were appointed, that the assets exceed the liabilities by $13,000,000. Unfortunately this case does not offer possibility of paying general creditors in full. There was adjudication in bankruptcy March 10, 1934." (R. 91.)

This is typical of the arguments advanced by the receivers in the District Court and in the Court of Appeals, which no doubt persuaded both courts in arriving at an erroneous conclusion. The petition for the appointment of the receivers alleges the value of the assets over and above liabilities of the company to be $13,000,000. The company, in order to immediately procure the appointment of receivers admits the averments of the bill of complaint and

joins in the prayer thereof (R. 6) which action is confirmed by the Board of Directors (R. 10). In the stipulated facts it is agreed that the company has assets of $21,415,467 (R. 65, Par. 3). The total amount of liabilities as shown by the bill of complaint is slightly over $7,000,000 (R. 3). We must assume that these verified pleadings filed by one side and agreed to by the company contain a truthful statement of the facts. The decree in this case was entered in the District Court, January 31, 1934, and the petition in bankruptcy under which respondent was appointed trustee was not filed until February 18, 1934, so that when this case was tried and all of the facts were before the District Court there was no adjudication in bankruptcy and for all that appears from the record the company was amply solvent, and the business was being conducted by the operating receivers. The stipulation filed in the Circuit Court of Appeals, April 27, 1934, the day when the oral argument was heard, discloses that on February 18, 1934 a petition in bankruptcy was filed and the adjudication was made March 10, 1934. We insist that so far as this record is concerned, it discloses affirmatively that the Grigsby-Grunow Company is amply solvent and able to respond to the full amount of petitioner's claim. Aside from that, however, the receivers collected over $350,000 on accounts assigned to the intervening petitioner (R. 45, Par. 22) and whether the company was insolvent or not, is not the issue. There was sufficient collections on accounts assigned out of which petitioner could have been paid the full amount of its advances, its compensation and reasonable attorney's fees. The argument now made that "unfortunately this case does not offer the possibility of paying general creditors in full," is entirely outside of the record.

Courts Do Not Favor Provisions of a Contract Creating a Penalty, Particularly When That Penalty Is Directed not Toward the Party to the Contract but Toward the Assets of an Estate in Receivership or Bankruptcy.

Under this point, which we think is inapplicable, counsel cite *Kothe, Trustee* v. *R. C. Taylor Trust,* 280 U. S. 224. There a lease contained a provision fixing damages payable *only* out of the assets of a bankrupt estate. This court said (p. 226):

> "The courts are 'strongly inclined to allow parties to make their own contracts, and to carry out their intentions, even when it would result in the recovery of an amount stated as liquidated damages, upon proof of the violation of the contract, and without proof of the damages actually sustained* * *. The question always is, what did the parties intend by the language used? When such intention is ascertained it is ordinarily the duty of the court to carry it out.'"

There is a distinction between interest accruing by virtue of the terms of a contract and interest awarded by way of damages for a breach of the contract, although the recovery is frequently spoken of as a recovery of interest. 17 C. J. 813.

In *Buckingham* v. *Orr,* 6 Colo. 587, the defendant executed notes bearing interest at the rate of 2 per cent per month until due and, if not paid when due, to bear interest at 3 per cent a month until paid.

The court said, at page 591:

> "We have no statute on the subject of usury, and a party may contract for and collect whatever rate of interest he chooses, provided such interest be intended as compensation for the use of the money."

And at page 592, the court said:

> "We must say that the rate specified in these notes was *prima facie* sufficient to establish the measure of

damages for breach of the contract. No evidence of any kind was offered to overcome this *prima facie* showing, and the court should have accepted the measure of damages thus established."

In *Reeves* v. *Stipp*, 91 Ill. 609, a promissory note provided for payment of 10 per cent interest from date if not paid when due and the court said, at page 610:

"The defense insisted upon is, that the interest reserved in the note from the date thereof, unless paid at maturity, is a penalty, and as the maker died before the note matured, it is contended the estate, equitably, ought not to be held for it. The fallacy of the position taken lies in the assumption, that the rate of interest reserved from the date of the note, which was evidently intended to secure prompt payment, is penalty and not liquidated damages. Whether the sum named in an agreement to secure performance will be treated as liquidated damages or as a penalty, is often a question of much difficulty, but the authorities are to the effect it must be determined in accordance with the intention of the contracting parties, when that can be ascertained. *Gobble* v. *Linder*, 76 Ill. 157. It is very clear the parties in this case intended the interest reserved should be the measure of damages in case the note was not paid when due. The parties call it neither penalty nor liquidated damages, but that is a matter of no consequence. It is simply a rate of interest which is lawful by contract under our statute from the date of the note, inserted with a view to secure prompt payment. It is a contract the maker could lawfully make, and if living it could be enforced against him as valid and binding in law. It is not understood how the death of the maker of the note can render void his contract understandingly and fairly entered into. The intestate chose to make his contract in this form, and no reason exists why it should not be enforced as he made it. It may be well understood, from the contract itself, that the damages for nonpayment of the principal of the note at maturity have been the subject of calcula-

tion and adjustment, and the amount definitely agreed upon by the rate of interest fixed from the date of the note.

"It is said, that because of the death of the maker he could not pay the note so as to avoid the interest from date. Were that a valid objection, it might be urged with equal propriety against paying interest on any interest bearing obligations after maturity in case of death of the makers—a proposition that finds no sanction either in reason or authority."

Funds in Custodia Legis and Not Held for Unreasonable Periods Do Not Ordinarily Bear Interest Unless Interest Is Earned Upon Such Funds.

We find, upon referring to the authorities cited in support of this point, that none support the contention of respondent. In *Thomas* v. *Western Car Co.*, 149 U. S. 95, the question was whether to allow several portions of a claim for rental and repair of cars to a railroad company before and during receivership. The facts are so entirely different, however, as to hardly admit of any analogy.

In *American Iron and Steel Manufacturing Co.* v. *Seaboard Air Line Railway*, 233 U. S. 261, the *Thomas* case was distinguished and not followed, and this court, at page 267 said:

"For, manifestly, the law does not contemplate that either the debtor or the trustees, can, by securing the appointment of Receiver, stop the running of interest on claims of the highest dignity."

We do not believe that either *Chemical National Bank* v. *Armstrong*, 59 Fed. 372, or *Richardson* v. *Louisville Banking Co.*, 94 Fed. 442, are applicable, inasmuch as the United States statutes provided that assets of insolvent national banks, when converted into money by the receivers must be paid to the United States Treasury, for distribution to creditors by the Comptroller of

the Currency, whereas in the instant case there was no statutory requirement that the receivers hold the funds collected by them or pay them over to any governmental department or official.

In *Sexton, Trustee* v. *Dreyfus,* 219 U. S. 339, this court held that a secured creditor of a bankrupt may apply interest and dividends accruing on securities after the date of the petition to interest on the debt accruing after such date in the event he is able to realize sufficient on his security so to do, although in the event the securities are not ample to pay the debt, he cannot apply the proceeds of the securities to the payment of interest after the date of the petition in bankruptcy.

The *Sexton* case also was considered in *In re: Gotham Can Company,* 48 Fed. (2d) 540, where a contract similar to the instant one is involved, and its inapplicability is there fully stated.

We submit that the funds in the hands of these operating receivers cannot be considered *in custodia legis.*

Denial by Equity of the Relief Prayed.

Under this point respondent contends that because the intervening petition prayed that *money* be paid to petitioner, it was seeking equitable relief. No mention whatever is made of the policy of the Illinois law as determined from its statutes and the decisions of its Supreme Court. Likewise, respondent fails to comment on the numerous decisions cited, which hold that such statutes and decisions of the Illinois courts are binding on Federal courts of equity sitting within Illinois. In support of this point respondent cites numerous cases, the first of which is *National Fire Insurance Co.* v. *Thompson,* 281 U. S. 331, cited by the Court of Appeals in the instant decision. In that case the insurance company not only entered into a stipulation to do certain things which it failed to do, thereby

precluding the courts from determining the issues of fact involved, but charged premiums in violation of the stipulation and orders entered pursuant thereto, and this court held that the lower court could withhold relief until the company kept its promises. In the instant case, petitioner violated no stipulation or order of court.

In *Miss. & Mo. R. R. v. Cromwell,* 91 U. S. 643, under a judgment and execution against a county, the marshall assumed to levy on 1,740 shares of capital stock, in a railroad company, belonging to the county and sold the same to appellee for $50, after a decree was entered in other proceedings in favor of the judgment creditor and other creditors, which decree held said stock, deposited in the foreclosure proceedings brought against the railroad company, should be held by the depositary for the benefit of the creditors of the county, including the judgment creditor. This court said, in reversing the Circuit Court:

> "If by payment of the county bonds, or in any other way, the 16 per cent becomes liberated from the decree, the county will be equitably entitled to the money, unless Cromwell, the appellee, has a better equity. To him it will be a windfall, like a prize in a lottery. He paid no adequate consideration to entitle him to claim it as a matter of equity. If the law gives it to him, he should seek his remedy at law. Equity will not lend its aid to any such games of hazard.* * * He comes into court with a very bad grace when he asks to use its extraordinary powers to put him in possession of thirty thousand dollars worth of stock for which he paid only fifty dollars. The court is not bound to shut its eyes to the evident character of the transaction."

This court then went on to say that which is quoted by respondent. There is no analogy between that case and the instant case.

In *Cragin* v. *Powell,* 128 U. S. 691, it was held that one who acquires land, knowing that it covers a portion of a

tract claimed by another, will be held either not to mean to acquire the tract of the other, or will be considered to be watching for accidental mistakes of others and preparing to take advantage of them, and as such not entitled to receive aid from a court of equity. The facts in that case were that a surveyor thought he discovered an error in public lands and induced appellee's grantor to obtain a patent from the state of Louisiana, when the appellee knew that the tracts to which he was laying claim had been possessed and cultivated by appellant for a long period of years.

In *Deweese* v. *Reinhard*, 165 U. S. 386, it was held that plaintiff was an intruder on lands conveyed by the United States to the State of Nebraska and declined to assent to plaintiff's contention that, because he did not have a legal title, a court of equity must enforce and establish his right; plaintiff attempting to establish a right in himself to the land, notwithstanding the grants were all a matter of record.

In *Randolph* v. *Quidnick Co.*, 135 U. S. 457, Randolph purchased at an execution sale stock worth over a half million dollars for the sum of $275, which execution sale was ten years subsequent to the transfer of said stock by the judgment debtor to trustees for the benefit of creditors, Randolph having been one of the creditors and having knowledge of the assignments. This court said, page 460:

> "The purchase was purely speculative. If the transfers theretofore made by the Spragues for the benefit of their creditors are sustained, the purchaser takes nothing. If they are not to be sustained they fail *in toto,* and the entire value of the property belongs to this purchaser. So his purchase is one simply to speculate upon the chances of successfully attacking transfers of large property, made for the benefit of creditors, and with the view of depriving them of the benefits of such transfers. It is a case where

equity, true to its ideas of substantial justice, refuses to be bound by the letter of legal procedure, or to lend its aid to a mere speculative purchase which threatens injury and ruin to a large body of honest creditors, who have trusted for payment of their debts to the legal validity of proceedings theretofore taken."

In *Jenkins* v. *Greenebaum, et al.,* 95 Ill. 11, the defense of usury was asserted by an individual. There is no question but that under the Illinois law an individual may claim usury either at law or in equity.

Higgins v. *Lansingh,* 154 Ill. 301, involved questions of fraud in the making of a contract, and one or more of the directors voting to make the contract on behalf of the corporation had a personal interest therein, which, of course, is not the case here, and therefore not in point.

CONCLUSION.

The contract in the instant case was entered into between two large corporations, dealing at arm's length. Petitioner on its part agreed to perform certain services and advance large amounts of money. It did both. The company agreed that for the advance of such moneys and the rendition of services it would pay petitioner a stipulated rate of compensation. Petitioner permitted the company to collect the assigned accounts receivable, provided remittances in kind were made each day. Both parties lived up to the contract until a creditor filed a petition for the appointment of a receiver. The day following such appointment the company answered, admitted the allegations of the petition and consented to the appointment of receivers. The receivers were appointed and qualified the same day. One of the receivers was the vice president of the company and the other counsel for respondent. From their actions, as shown by

the record, they were thoroughly familiar with all of the affairs of the company, and on the day following their appointment filed a petition and procured the District Court to enter an order, under which they would not have performed the company's obligations under the contract. That this order which was entered without notice would have been very harmful to petitioner is almost conceded, and in a burst of generosity the receivers offered to recognize whatever loss petitioner sustained as a general unsecured claim. This scheme of the receivers was detected and petitioner retained counsel to protect its rights, and upon the filing of the intervening petition the receivers continued to collect all funds on such assigned accounts and refused to turn any part of it over, without an order of court.

The receivers then induced the District Court to enter an order permitting them to spend $35,000 in an advertising campaign, and they are now seeking contribution for such expenditure from this petitioner.

It is respectfully insisted that petitioner was acting entirely within its legal rights. That it sought no unfair advantage over the receivers, but was merely seeking to enforce its contract. The fact that the matter was pending in a court of equity, should not deprive petitioner of its legal rights.

Exactly the same contract and the same issues were before the court in *Ramsey, et al.* v. *Marlin Firearms Corporation,* 14 Fed. (2d) 314, wherein the court said:

> "It is not the province of the court to determine whether this contract was onerous or fair in its provisions. It is sufficient that it was entered into, and all we are here permitted is to determine the exact obligation of each party to it. One twenty-fifth of 1 per cent. per diem, computed, not upon the amount advanced, but upon the total face amount of the outstanding accounts, probably was equal to interest at the rate of over 20 per cent., but the parties solemnly

agreed to this arrangement. No question of usury has been raised here, so there is no option left to the court, except to enforce the arrangement, unless some principle of law bars such enforcement."

The answers of the receivers set forth no defense and the court should have stricken the answers from the file and entered a decree in favor of the petitioner.

The decision of the 7th Circuit in the Chicago Reed & Furniture Company case and the decision in the instant case by the Court of Appeals are wholly without foundation in point of law, and should be reversed.

Respectfully submitted,

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